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Erroneous and Unauthorized Revisions to the California Environmental Quality Act: 1998 CEQA Revisions Violate Legislative Intent and Contradict Judicial Holdings

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COMMENT

ERRONEOUS AND UNAUTHORIZED REVISIONS TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT: 1998 CEQA REVISIONS VIOLATE LEGISLATIVE INTENT AND CONTRADICT JUDICIAL HOLDINGS

I. INTRODUCTION

In October 1998, the Governor's Office of Planning and Research (OPR) amended the guidelines that interpret the California Environmental Quality Act (CEQA).¹ One of OPR's main goals of these revisions was to assist public agencies in making their discretionary determinations required under the

¹ See CAL. PUB. RES. CODE § 21083 (West 1996). The Governor's Office of Planning and Research ("OPR") is the California agency that the California Legislature delegated the power to create California Environmental Quality Act ("CEQA") Guidelines. The Office of Planning and Research developed guidelines for the implementation of CEQA. The guidelines assist public agencies by providing objectives and criteria on how to administer CEQA. Additionally, the guidelines assist the public with how to orderly evaluate projects. See *id.* See also Maureen F. Gorsen, *1998 CEQA Guidelines Revisions: What Every CEQA Practitioner Needs to Know* (last modified Nov. 12, 1998) <http://www.ceres.ca.gov/ceqa_article_1098.html>. See also CAL. PUB. RES. CODE § 21000 et. seq. (West 1996).

460 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:3]

CEQA process.² These revisions, however, merely narrowed the scope of environmental review that had been broadened by the judiciary.³

A public agency's discretion in determining when a project⁴ significantly affects⁵ the environment has plagued California reviewing agencies since the legislature adopted CEQA in 1970.⁶ Under the CEQA process, the lead agency⁷ must make two important discretionary decisions.⁸ The first is whether the environmental consequences of a project are *potentially* significant enough to require preparation of an Environmental Impact Report (EIR).⁹ The second is when those "potentially significant" consequences become *actually* significant based on

² See *id.*

³ See *infra* notes 226-235 and accompanying text for a discussion of results of CEQA revisions.

⁴ See CAL. PUB. RES. CODE § 21065 (West 1996). A project is any activity:

(a) directly undertaken by any public agency; (b) undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies; (c) that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more of the public agencies. *Id.*

⁵ See CAL. CODE REGS. tit. 14, § 15382 (1999). "A significant effect on the environment means substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance." *Id.*

⁶ See Maureen F. Gorsen, 1998 *CEQA Guidelines Revisions: What Every CEQA Practitioner Needs to Know* (last modified Nov. 12, 1998) <http://www.ceres.ca.gov/ceqa_article_1098.html>.

⁷ See CAL. CODE REGS. tit. 14, § 15367 (1999). A lead agency is "the public agency which has the principal responsibility for carrying out or approving a project." *Id.*

⁸ See Maureen F. Gorsen, 1998 *CEQA Guidelines Revisions: What Every CEQA Practitioner Needs to Know* (last modified Nov. 12, 1998) <http://www.ceres.ca.gov/ceqa_article_1098.html>.

⁹ See CAL. CODE REGS. tit. 14, § 15362 (1999).

An 'EIR' or 'environmental impact report' means a detailed statement prepared under CEQA describing and analyzing the significant environmental effects of a project and discussing ways to mitigate or avoid the effects. The contents of an EIR are discussed in Article 9, commencing with Section 15120 of these guidelines. The term 'EIR' may mean either a draft or a final EIR depending on the context. *Id.*

information contained in the EIR.¹⁰ In their previous form, the CEQA Guidelines provided insufficient criteria on which the lead agencies could base a determination regarding the significance of a project's effects.¹¹ This has been particularly problematic when cumulatively considerable impacts become significant.¹²

In Part II, this Comment will summarize the CEQA review process to which California agencies must adhere.¹³ Next, Part III of this Comment will examine *San Joaquin Raptor/Wildlife Rescue v. Stanislaus* and *Kings County Farm Bureau v. Hanford*, two landmark California appellate court cases that have interpreted the CEQA review process prior to the amended regulations.¹⁴ Included in Part III A is an analysis of how lead agencies have treated cumulative impacts in the past during the CEQA review process and an explanation of the recent amendments purporting to codify that interpretation.¹⁵ In Part III B, this Comment will explain the recent amendments to CEQA legislation.¹⁶ Finally, based on the implications of the revised legislation, Part IV of this Comment will propose further revisions that should be incorporated into CEQA to allow for a larger scope of environmental review of cumulative impacts and for a more controlled development of California.¹⁷

¹⁰ See Maureen F. Gorsen, *1998 CEQA Guidelines Revisions: What Every CEQA Practitioner Needs to Know* (last modified Nov. 12, 1998) <http://www.ceres.ca.gov/ceqa_article_1098.html>.

¹¹ See *id.*

¹² See *id.*

¹³ See *infra* notes 18-125 and accompanying text.

¹⁴ See *San Joaquin Raptor/Wildlife Rescue Center v. Stanislaus*, 49 Cal. Rptr. 2d 494 (1996); *Kings County Farm Bureau v. Hanford*, 270 Cal. Rptr. 650 (1990). See also *infra* notes 126-176 and accompanying text.

¹⁵ See *infra* notes 126-176 and accompanying text.

¹⁶ See *infra* notes 177-190 and accompanying text.

¹⁷ See *infra* notes 236-241 and accompanying text.

462 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:3]

II. BACKGROUND

In 1969, the United States Congress passed the National Environmental Policy Act (NEPA),¹⁸ which requires federal agencies to analyze the environmental consequences of projects, and their alternatives, before approving them.¹⁹ This preliminary analysis allows federal agencies to avoid or minimize adverse environmental impacts before the damage occurs.²⁰ It also promotes a holistic approach to decision-making by incorporating environmental considerations into the process.²¹

The California State Assembly responded to NEPA by creating the California State Assembly Select Committee on Environmental Quality (the Committee) to study the possibility of supplementing NEPA through state law.²² At the conclusion of its study, the Committee recommended a state counterpart to NEPA in its report entitled "The Environmental Bill of Rights."²³ When the California Legislature reviewed the report, it became aware that the capacity of the California environment to manage its own ecosystem was limited and in danger of being destroyed.²⁴ The Legislature then declared that California must develop a high quality environment and maintain it into the future, take all action necessary to protect, rehabilitate and enhance its environment and identify the minimum, critical thresholds for the health and safety of its

¹⁸ See 42 U.S.C. § 4321 (1994).

¹⁹ See *The California Environmental Quality Act: Frequently Asked Questions About CEQA* (last modified Nov. 12, 1998) <http://www.ceres.ca.gov/topic/env_law/ceqa/more/faq.html>. See also 42 U.S.C. § 4332 (1994).

²⁰ See *id.* at § 4332 (c).

²¹ See *id.* at § 4332 (a).

²² See *The California Environmental Quality Act: Frequently Asked Questions About CEQA* (last modified Nov. 12, 1998) <http://www.ceres.ca.gov/topic/env_law/ceqa/more/faq.html>.

²³ See *id.*

²⁴ See CAL. PUB. RES. CODE § 21000 (West 1996).

people.²⁵ In response to these findings, the California Legislature enacted the California Environmental Quality Act (CEQA).²⁶

CEQA's main purpose is to inform public decision makers of the potentially adverse environmental impacts of projects that are carried out, funded, or approved by them before environmental damage occurs.²⁷ CEQA's secondary purpose is to identify and implement feasible alternatives or measures that would mitigate a project's adverse environmental impacts.²⁸ Finally, a third purpose of CEQA is to promote public participation in the environmental review process so that every citizen can contribute to the preservation of the environment.²⁹

A. CEQA'S THREE-STEP SYSTEM OF ENVIRONMENTAL REVIEW

To assist the public and the public agencies in carrying out CEQA's purposes, the Governor's Office of Planning and Research (OPR) developed guidelines to explain and interpret CEQA legislation.³⁰ These CEQA Guidelines provide objectives, criteria, and procedures for the evaluation of environ-

²⁵ See *id.* "[I]t is the intent of the Legislature that the government of the state take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds [sic] being reached." *Id.*

²⁶ See *id.* See also *The California Environmental Quality Act: Frequently Asked Questions About CEQA* (last modified Nov. 12, 1998) <http://www.ceres.ca.gov/topic/env_law/ceqa/more/faq.html>.

²⁷ See *CEQA: Making It Work Better* (visited March 1, 2000) <<http://www.lao.ca.gov/ceqa%5f397.html>>.

²⁸ See *id.*

²⁹ See *id.* See also CAL. CODE REGS. tit. 14, § 15201 (1999).

Public participation is an essential part of the CEQA process. Each public agency should include provisions in its CEQA procedures for wide public involvement, formal and informal, consistent with its existing activities and procedures, in order to receive and evaluate public reactions to environmental issues related to the agency's activities. *Id.* See also CAL. PUB. RES. CODE § 21000(e) (West 1996).

"Every citizen has a responsibility to contribute to the preservation and enhancement of the environment." *Id.*

³⁰ See CAL. PUB. RES. CODE § 21083 (West 1996).

464 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:3]

mental information relating to a project.³¹ The purpose of these guidelines is to make CEQA comprehensible to those who administer it, to those who are subject to it, and to those who benefit from its existence.³² To carry out this objective, the CEQA Guidelines establish a three-step environmental review process for any activity or project that may cause a physical change in the environment.³³

1. First Step: Determining Whether a Project is Exempt or Subject to Further Review

a. Project and Exemption Determination

The first step of the environmental review process must be completed by the lead agency that is responsible for complying with CEQA.³⁴ The first phase of this step determines whether the activity is a project as defined by CEQA.³⁵ Any activity not so defined is not reviewed.³⁶ A project is defined as any activity that causes a direct, or reasonably foreseeable indirect,

³¹ See *The California Environmental Quality Act: Frequently Asked Questions About CEQA* (last modified Nov. 12, 1998) <http://www.ceres.ca.gov/topic/env_law/ceqa/more/faq.html>.

³² See *id.*

³³ See CAL. CODE REGS. tit. 14, § 15060.5(a) (1999).

For a potential project involving the issuance of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies, the lead agency shall, upon the request of a potential applicant and prior to the filing of a formal application, provide for consultation with the potential applicant to consider the range of actions, potential alternatives, mitigation measures, and any potential significant effects on the environment of the potential project. *Id.*

³⁴ See CAL. CODE REGS. tit. 14, § 15050 (1999). "Where a project is to be carried out or approved by more than one public agency, one public agency, the lead agency, shall be responsible for preparing an EIR or a negative declaration for the project." *Id.* See also CAL. CODE REGS. tit. 14, § 15367.

³⁵ See CAL. CODE REGS. tit. 14, § 15378(a) (1999).

An activity directly undertaken by any public agency can include but is not limited to, public works construction and the related activities of clearing or grading land, improvements to existing public works construction, improvements to existing public structures, the enactment and amendment of zoning ordinances, and the adoption and amendment of local General Plans or elements thereof pursuant to Government Code Sections 65100-65700. See *id.* at (a)(1).

³⁶ See CAL. CODE REGS. tit. 14, § 15060(c)(3) (1999).

physical change in the environment.³⁷ Additionally, a project is an activity that is: directly undertaken by any public agency, supported through public funding, or involves the issuance of a lease, permit, license, certificate, or other entitlement by a public agency.³⁸

After the lead agency determines that an action is a “project,” its next inquiry is whether the activity is exempt from CEQA review under another California statute or because of a categorical exemption specified within CEQA.³⁹ If the activity is statutorily exempt, such as repairing property destroyed as a result of a disaster,⁴⁰ the lead agency need not conduct further review.⁴¹ However, if the project is categorically exempt,⁴² the lead agency must inquire further to determine whether the categorical exemption is negated.⁴³ A categorical exemption may be negated if extraneous circumstances dictate that the project should not be exempted from CEQA review, such as when the project site is environmentally sensitive or when many similar projects will result in cumulative impacts.⁴⁴ If

³⁷ See CAL. CODE REGS. tit. 14, § 15378(a) (1999).

³⁸ See CAL. CODE REGS. tit. 14, § 15378(a)(1)-(3) (1999).

³⁹ See CAL. CODE REGS. tit. 14, § 15061 (1999).

⁴⁰ See CAL. CODE REGS. tit. 14, § 15269(a) (1999).

⁴¹ See CAL. CODE REGS. tit. 14, § 15260-15285 (1999). The exemptions take several forms. Some exemptions are complete exemptions from CEQA. Other exemptions apply only to part of the requirements of CEQA, and still other exemptions apply only to the timing of CEQA compliance. Examples of projects that are exempt from CEQA include activities necessary to host the Olympics, or to the establishment of large family day care homes. *See id.*

⁴² See CAL. CODE REGS. tit. 14, § 15300-15332 (1999). The Public Resources Agency made some projects categorically exempt from CEQA environmental review. Some examples of categorically exempt projects include minor modifications to existing buildings, maintenance of existing water supply reservoirs, water main and sewage construction for the benefit of residential construction. *See id.*

⁴³ See CAL. CODE REGS. tit. 14, § 15300.2 (1999).

⁴⁴ See CAL. CODE REGS. tit. 14, § 15300.2 (1999). Other circumstances that negate a categorical exemption are when the cumulative impacts of successive projects of the same type in the same location is significant over time, there are unusual circumstances creating the reasonable possibility of significant effects; when the project may result in damage to scenic resources; the project is located on a site that the Department of Toxic Substances Control and the Secretary of Environmental Protection have

466 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:3]

the lead agency determines that the project is exempt, it files a Notice of Exemption (NOE) with the project application and does not conduct further review.⁴⁵

b. Identifying Potential Environmental Effects

If a project is not exempt, the next step of the preliminary review process is determining whether a proposed project has a "potentially significant effect" on the environment.⁴⁶ If the lead agency determines, with certainty, that the activity in question could not possibly have any significant effect on the environment, then the activity is not subject to further review and the lead agency files a NOE.⁴⁷ However, if the agency determines the project could have a potentially significant effect on the environment, it moves to the next phase of CEQA review.⁴⁸

2. Second Step-The Initial Study

Any project that is not exempt and has the potential to cause a significant effect on the environment is subject to an initial study, which is to identify a project's potential environmental impacts.⁴⁹ The identification not only provides lead

identified as being hazardous waste or clean-up problems pursuant to Government Code § 65962.5; or the project may cause a substantial adverse change in the significance of a historic resource. *See id.*

⁴⁵ *See generally* CAL. CODE REGS. tit. 14, § 15062 (1999). *See also* CAL. CODE REGS. tit. 14, § 15062(a) (1)-(3) (1999). A Notice of Exemption (NOE) shall include a brief description of the project, a finding that the project is exempt from CEQA, including a citation to the State Guidelines section or statute under which it is found to be exempt, and a brief statement of reasons to support the finding. *See id.*

⁴⁶ *See* CAL. CODE REGS. tit. 14, § 15060.5(a) (1999).

⁴⁷ *See* CAL. CODE REGS. tit. 14, § 15061(b)(3) (1999).

⁴⁸ *See* CAL. CODE REGS. tit. 14, § 15063 (1999). After preliminary review, the lead agency conducts an initial study to determine if the project may have any significant effects on the environment. *See id.*

⁴⁹ *See* CAL. CODE REGS. tit. 14, § 15063(d)(1)-(6) (1999).

An initial study shall contain in brief form a description of the project including the location of the project, an identification of the environmental setting, an identification of environmental effects by use of a checklist, provided the entries on the checklist are briefly explained to indicate that there is some evidence to support the entries, a discussion on ways to mitigate the significant effects identified, an examina-

agencies with the information necessary to guide them in determining whether to prepare an Environmental Impact Report, a Negative Declaration,⁵⁰ or a Mitigated Negative Declaration,⁵¹ but assists in the preparation of an EIR, should one be necessary, by identifying effects that the EIR should examine.⁵² The initial study however, is not intended nor required to include the level of detail that an EIR requires.⁵³

To be helpful to the lead agency, the initial study must describe the proposed project and the site where the project is slated to exist.⁵⁴ The initial study must also identify and describe any potential environmental impacts that the proposed project may create.⁵⁵ Once the potential impacts are identified,

tion of whether the project would be consistent with existing zoning, plans and other land use controls, and the name(s) of the person(s) who prepared or participated in the initial study. *Id.* See also CAL. CODE REGS. tit. 14, § 15365 (1999).

An initial study is a preliminary analysis prepared by the lead agency to determine whether an EIR or a negative declaration must be prepared or to identify the significant environmental effects to be analyzed in an EIR. Use of the initial study is discussed in Article 5, commencing with Section 15060. *Id.*

⁵⁰ See CAL. CODE REGS. tit. 14, § 15371 (1999). A negative declaration means "a written statement by the lead agency briefly describing the reasons that a proposed project, not exempt from CEQA, will not have a significant effect on the environment and therefore does not require the preparation of an EIR." *Id.* See also CAL. CODE REGS. tit. 14, § 15071 (1999). A negative declaration includes a description of the project, where it is located, a finding that the project will have no significant effect, facts to support this conclusion and a list of any mitigation measures. See *id.* See also CAL. CODE REGS. tit. 14, § 15063(c) (1999).

⁵¹ See CAL. CODE REGS. tit. 14, § 15369.5 (1999). When an initial study identified potentially significant effects on the environment but subsequent revisions to the project mitigated these effects to a point where there is no evidence that the project will have significant effect on the project a mitigated negative declaration will be issued. See *id.*

⁵² See CAL. CODE REGS. tit. 14, § 15063(c) (1999). The study assists in the preparation of an EIR by focusing the EIR on the effects determined to be significant, and explaining the reasons for determining that certain effects would not be significant. See *id.*

⁵³ See CAL. CODE REGS. tit. 14, § 15063(a)(3) (1999). "An initial study may rely upon expert opinion supported by facts, technical studies or other substantial evidence to document its findings." *Id.*

⁵⁴ See CAL. CODE REGS. tit. 14, § 15063(d)(1)-(2) (1999).

⁵⁵ See CAL. CODE REGS. tit. 14, § 15063(d)(3) (1999). Identification of an impact can be through the use of a checklist, matrix, or other method. See *id.*

468 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:3]

the study must then discuss any mitigation measures that could eliminate these effects.⁵⁶ Finally, the initial study must consider whether the proposed project is consistent with existing local zoning, planning, and other land use controls.⁵⁷

If the initial study exposes potential environmental impacts, the lead agency must use a substantial evidence test to determine if these impacts have a significant or non-significant effect on the environment.⁵⁸ The substantial evidence test determines whether the lead agency has enough relevant information and reasonable inferences from which a fair argument can be made to support a conclusion, even though other conclusions might also be reached.⁵⁹

a. Significant Effect on the Environment

The CEQA Guidelines define significant effect on the environment as a "substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic and aesthetic significance."⁶⁰ Despite this broad definition, however, the lead agency's determination of whether an effect is significant is a discretionary decision based on the careful analysis of the sci-

⁵⁶ See CAL. CODE REGS. tit. 14, § 15063(d)(4) (1999).

⁵⁷ See CAL. CODE REGS. tit. 14, § 15063(d)(5) (1999).

⁵⁸ See CAL. CODE REGS. tit. 14, § 15063(b)(1) (1999). "If the agency determines that there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial, the lead agency shall" either prepare an EIR, use a previously prepared EIR, or determine which aspects of the project were covered by a previous EIR and do another EIR for those aspects not covered. See *id.*

⁵⁹ See CAL. CODE REGS. tit. 14, § 15384 (1999). Whether a fair argument can be made is to be determined by examining the entire record. Mere uncorroborated opinion or rumor does not constitute substantial evidence. See *id.*

⁶⁰ See CAL. CODE REGS. tit. 14, § 15382 (1999).

entific and factual information available.⁶¹ Thus, a bright-line definition of a significant effect by an agency is not possible.⁶²

The CEQA Guidelines, however, offer some bright-line rules by defining certain effects as automatically significant.⁶³ For example, a substantial degradation in the quality of the environment or a substantial reduction in the plant or animal populations are automatically significant under the guidelines.⁶⁴ Additionally, significance must be found if the project has possible effects that are cumulatively considerable but are individually limited, even if the effects would not be significant when evaluated individually.⁶⁵ Once any of these enumerated impacts are found the lead agency must move to the next phase of environmental review and prepare an EIR.⁶⁶

If, instead, the lead agency does not find that any of the listed impacts may occur, then it must determine whether any of the impacts actually found are significant.⁶⁷ The CEQA Guidelines offer assistance in this area.⁶⁸ First, the guidelines require the lead agency to consider the direct consequences

⁶¹ See CAL. CODE REGS. tit. 14, § 15064(b) (1999).

⁶² See *id.* "An ironclad definition of significant effect is not always possible because the significance of an activity may vary with the setting. For example, an activity which may not be a significant in an urban area, may be significant in a rural area." *Id.*

⁶³ See CAL. CODE REGS. tit. 14, § 15065 (1999). Other examples include reducing the number or restricting the range of an endangered, rare or threatened species, or eliminating important examples of the major periods of California history or pre-history, achieving short term environmental goals to the disadvantage of long-term goals, or if the environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly. See *id.* See also MICHAEL H. REMY ET AL., GUIDE TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 106 (9th ed. 1996). These impacts are codified to eliminate an agency's tendency to understate the significance of a project's impacts, which are often done to avoid the time and expense of continuing an environmental review. See *id.*

⁶⁴ See CAL. CODE REGS. tit. 14, § 15065(a) (1999).

⁶⁵ See CAL. CODE REGS. tit. 14, § 15065(c) (1999).

⁶⁶ See CAL. CODE REGS. tit. 14, § 15362 (1999). See also CAL. CODE REGS. tit. 14, § 15091 (1999).

⁶⁷ See CAL. CODE REGS. tit. 14, § 15064 (1999).

⁶⁸ See CAL. CODE REGS. tit. 14, § 15064(d) (1999).

470 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:3]

immediately related to the project.⁶⁹ For example, the increase in the amount of dust, noise, or traffic from the construction of a sewage treatment plant would be a direct impact.⁷⁰ Second, the guidelines state that the lead agency must consider the indirect consequences of the project, which are those consequences that stem from the direct consequences, but may be several steps removed from the project in the chain of causation.⁷¹ Such an example may be the increase in air pollution resulting from increase in dust and traffic.⁷²

If an agency determines that these non-listed impacts are significant, it must then consider whether they can be eliminated with the implementation of mitigation measures, which are revisions to the proposed project that avoid or lessen these effects to a point of non-significance.⁷³ If, after mitigating, the lead agency lacks substantial evidence that the revised project would have a significant effect on the environment, then the lead agency must adopt a Mitigated Negative Declaration ("MND").⁷⁴ On the other hand, if, after mitigating, the lead agency still finds substantial evidence that any aspect of the project, either individually⁷⁵ or cumulatively with other proj-

⁶⁹ See CAL. CODE REGS. tit. 14, § 15064(d)(1) (1999).

⁷⁰ See *id.*

⁷¹ See CAL. CODE REGS. tit. 14, § 15064(d)(2) (1999).

⁷² See *id.*

⁷³ See CAL. CODE REGS. tit. 14, § 15070(b) (1999).

⁷⁴ See CAL. CODE REGS. tit. 14, § 15070 (1999). See also CAL. CODE REGS. tit. 14, § 15369.5 (1999). A Mitigated Negative Declaration is a written statement of the reasons the proposed mitigated project will have no significant effect on the environment and the supporting evidence for this finding. See *id.*

⁷⁵ See CAL. CODE REGS. tit. 14, § 15355(a) (1999). "The individual effects may be changes resulting from a single project or a number of separate projects." *Id.*

ects,⁷⁶ creates a significant impact on the environment, the lead agency must move to the third step and prepare an EIR.⁷⁷

b. Determination of Non-Significant Effect on the Environment

Unlike an MND, however, if there was no need to mitigate the effects before the project was found not to have a significant effect on the environment the lead agency must issue a Negative Declaration (ND).⁷⁸ The ND, like an MND, is a written statement giving the reasons why the proposed project will not have significant effect on the environment and the supporting evidence for this finding.⁷⁹

Once such a statement is issued, the environmental review process ends, until the lead agency notifies the public of its intentions to adopt an MND or ND and provides an opportunity to review the initial study as well as any other supporting

⁷⁶ See CAL. CODE REGS. tit. 14, § 15355(b) (1999). "The cumulative impacts from several projects is the change in the environment which results from incremental impact of the project when added to other closely related past, present, and future projects. Cumulative impacts can result from individually minor, but collectively significant projects taking place over a period of time." *Id.*

⁷⁷ See CAL. CODE REGS. tit. 14, § 15063(b)(1) (1999).

⁷⁸ See CAL. CODE REGS. tit. 14, § 15070 (1999). A public agency shall prepare or have prepared a proposed negative declaration or mitigated negative declaration for a project subject to CEQA when: (a) the initial study shows that there is not substantial evidence, in light of the whole record before the agency, that the project may have a significant effect on the environment, or (b) the initial study identifies potentially significant effects, but: (1) revisions in the project plans or proposals made by or agreed to by the applicant before a proposed mitigated negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effects would occur, and (2) there is no substantial evidence, in light of the whole record before the agency, that the project as revised may have a significant effect on the environment. *See id.* See also *supra* note 56.

⁷⁹ See CAL. CODE REGS. tit. 14, § 15071 (1999).

A negative declaration circulated for public review shall include: (a) a brief description of the project, including a commonly used name for the project, if any; (b) the location of the project, preferably shown on a map, and the name of the project proponent; (c) a proposed finding that the project will not have a significant effect on the environment; (d) an attached copy of the initial study documenting reasons to support the finding; and (e) mitigation measures, if any, included in the project to avoid potentially significant effects. *Id.*

472 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:3]

documents.⁸⁰ During this opportunity for public review, the lead agency typically receives comments on the proposed project and the ND, which it must then review and address before it approves the ND and the underlying project.⁸¹ Addressing the comments however, merely means taking note of them; the agency is not required to actually change the project in accordance with the comments.⁸²

Once the lead agency grants approval, it must file a Notice of Determination (NOD).⁸³ The NOD is a notice explaining the agency's intent to approve the project. The NOD must contain the following elements: a brief description of the project, the date on which the agency determined that the project will have no significant effect on the environment, a statement that the agency complied with CEQA, and a copy of the ND.⁸⁴ At the time the agency files the NOD, a thirty-day statute of limitations period begins to run, during which time the agency's decision may be legally challenged for failure to comply with CEQA.⁸⁵

3. Step Three: The EIR

If, the lead agency has substantial evidence to show that a project may have a significant effect on the environment at the conclusion of the initial study, the agency must develop an Environmental Impact Report (EIR).⁸⁶ The purpose of the EIR is to provide agencies with a holistic view of a proposed project's impact and thus enable environmental considerations to influ-

⁸⁰ See CAL. CODE REGS. tit. 14, § 15075 (1999). See also Cal. Code of Reg. § 21092(a) (West 1996).

⁸¹ See CAL. PUB. RES. CODE § 21091(d)(1), 21091(f) (West 1996).

⁸² See CAL. PUB. RES. CODE § 21091(d)(1) (West 1996).

⁸³ See CAL. CODE REGS. tit. 14, § 15075(a) (1999).

⁸⁴ See CAL. CODE REGS. tit. 14, § 15075(b) (1999).

⁸⁵ See CAL. CODE REGS. tit. 14, § 15075(e) (1999). The filing of the Notice of Determination and the posting of such notice starts a 30-day statute of limitations on court challenges to the approval under CEQA. See *id.* See also *infra* notes 111-125 and accompanying discussion on judicial review.

⁸⁶ See *supra* note 9 for the definition of an EIR.

ence an agency's decision to approve a project.⁸⁷ To achieve its purpose, the EIR must assess the environmental impact that a proposed project will have on the surrounding environment.⁸⁸ The EIR must also identify mitigation measures to offset these impacts and suggest alternatives to the project.⁸⁹

In the first phase of developing an EIR, the lead agency must prepare a draft EIR (DEIR).⁹⁰ This DEIR should identify and discuss all significant direct and indirect environmental impacts that a proposed project may cause during each phase of the project.⁹¹ Specifically, the report should include all relevant specifics of the area, resources involved, physical changes, alterations to ecological systems, and changes induced in population distribution, population concentration, the human use of the land, health and safety problems caused by the physical changes.⁹² In addition, the DEIR should address other aspects of the resource base such as water, scenic quality and public

⁸⁷ See CAL. CODE REGS. tit. 14, § 15121 (1999).

⁸⁸ See CAL. CODE REGS. tit. 14, § 15362.2(a) (1999).

⁸⁹ See CAL. CODE REGS. tit. 14, § 15126.4(a)(1) (1999). See also CAL. CODE REGS. tit. 14, § 15131(a) (1999).

Economic or social effects of a project shall not be treated as significant effects on the environment. An EIR may trace a chain of cause and effect from a proposed decision on a project through anticipated economic or social changes resulting from the project to physical changes caused in turn by economic or social changes . . . intermediate economic or social changes need not be analyzed in any detail greater than necessary to trace the chain of cause and effect. The focus of the analysis shall be on the physical change. *Id.*

⁹⁰ See CAL. CODE REGS. tit. 14, § 15120-§15132 (1999). A draft EIR contains a description of the project, the physical environmental conditions in the vicinity, all environmental impacts that may result from the project but focusing on those impacts that are significant, mitigation measures that will reduce or eliminate significant impacts, alternatives to the project, effects not found to be significant, the cumulative impacts, economic and social effects. See *id.*

⁹¹ See CAL. CODE REGS. tit. 14, § 15126(a) (1999). See also CAL. CODE REGS. tit. 14, § 15126 (1999). The significant environmental effects of the proposed project shall be identified. All phases of a project must be considered when evaluating its impact on the environment. See *id.*

⁹² See CAL. CODE REGS. tit. 14, § 15126.2(a) (1999). Examples of significant impacts are all physical changes to the ecological system, changes in population distribution and depletion of water resources. See *id.*

474 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:3]

utilities.⁹³ Finally, the DEIR must also discuss the proposed mitigation measures and evaluate a reasonable range of alternatives to the proposed project.⁹⁴

During the second phase of the EIR process, the agency must file a Notice of Completion (NOC)⁹⁵ with the OPR⁹⁶ and provide the public with an opportunity to review the draft.⁹⁷ This phase allows the public to inform the agencies of their personal information about the project, voice concerns, and suggest any other impacts or alternatives. The lead agency must evaluate all comments, determine their significance, and respond to any significant environmental issues raised in the comments.⁹⁸

When the public review period is complete, the lead agency moves to the third phase of the EIR process and prepares a final EIR (FEIR).⁹⁹ This FEIR includes a copy of the draft EIR, or a revision thereof, comments received from the public, a list of those who commented, the lead agency's responses and any other information added by the lead agency.¹⁰⁰ Before approving the project analyzed in the FEIR, however, the lead agency

⁹³ See CAL. CODE REGS. tit. 14, § 15126.2(a) (1999). Examples of significant impacts are all physical changes to the ecological system, changes in population distribution and depletion of water resources. See *id.*

⁹⁴ See CAL. CODE REGS. tit. 14, § 15126.2(b) (1999). See also CAL. CODE REGS. tit. 14, § 15126(d) (1999).

⁹⁵ See CAL. CODE REGS. tit. 14, § 15085 (1999). A Notice of Completion contains a description of the project, the proposed location of the project, the address where copies of the Draft EIR are available and, how long the agency will be receiving comments on the Draft EIR. See *id.*

⁹⁶ See *infra* note 30 and accompanying text.

⁹⁷ See CAL. CODE REGS. tit. 14, § 15087 (1999).

⁹⁸ See CAL. CODE REGS. tit. 14, § 15088(a)-(b) (1999). "The lead agency shall evaluate comments on environmental issues received from persons who reviewed the draft EIR and shall prepare a written response. The lead agency shall respond to comments received during the noticed comment period and any extensions and may respond to late comments." See *id.* at 15088(a).

⁹⁹ See CAL. CODE REGS. tit. 14, § 15362(b) (1999). See also 14 Cal. Code or Reg. § 15089 (1999).

¹⁰⁰ See CAL. CODE REGS. tit. 14, § 15132 (1999).

must first “certify” the FEIR.¹⁰¹ Certification means that the lead agency verifies that the FEIR complies with CEQA and that it has reviewed and considered the information contained within the FEIR prior to approving the project.¹⁰²

Once certified, the proposed project moves into the “findings” phase, the purpose of which is to ensure that the decision-making agency actually considered the alternatives and mitigation measures.¹⁰³ In this phase, the lead agency must issue two sets of findings.¹⁰⁴ The first set discusses the lead agency’s response to the significant effects identified in the FEIR.¹⁰⁵ The second set includes a statement of overriding considerations, which explains the agency’s reasons for approving the project.¹⁰⁶

Approval is the final phase of the EIR process.¹⁰⁷ If the lead agency approves a project it must file an NOD within five working days of the approval.¹⁰⁸ Like the NOD required after a negative declaration, this NOD must state that the agency approved the project and articulate its reasons for approval despite the project’s significant effects.¹⁰⁹ Once the NOD is filed, the thirty-day statute of limitations begins to run for a judicial challenge of the project’s approval.¹¹⁰

¹⁰¹ See CAL. CODE REGS. tit. 14, § 15090(a) (1999).

¹⁰² See CAL. CODE REGS. tit. 14, § 15090 (1999).

¹⁰³ See CAL. CODE REGS. tit. 14, § 15091(a) (1999). See also MICHAEL H. REMY ET AL., GUIDE TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 200 (9th ed. 1996).

¹⁰⁴ See CAL. CODE REGS. tit. 14, § 15091(a) (1999).

¹⁰⁵ See CAL. CODE REGS. tit. 14, § 15092 (1999).

¹⁰⁶ See CAL. CODE REGS. tit. 14, § 15093 (1999).

¹⁰⁷ See CAL. CODE REGS. tit. 14, § 15090(a) (1999).

¹⁰⁸ See CAL. CODE REGS. tit. 14, § 15094(a) (1999).

¹⁰⁹ See CAL. CODE REGS. tit. 14, § 15094 (1999).

¹¹⁰ See CAL. CODE REGS. tit. 14, § 15094(f) (1999).

476 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:3]

B. JUDICIAL REVIEW

1. *Statute of Limitations*

A member of the public may challenge an agency's decision at any of the three points in the CEQA process.¹¹¹ The first, is after the agency declares a project exempt from CEQA and the plaintiff asserts that the proposed project may have a significant, harmful impact on the environment, that person may challenge the agency's determination.¹¹² If the lead agency filed an NOE, the statute of limitations is thirty-five days from the date the NOE is filed; however, if the lead agency did not file an NOE, then the statute of limitations is 180 days.¹¹³

Second, a member of the public may challenge an agency's decision to file an NOD, based either on an ND or an MND.¹¹⁴ If the agency complied with the law and filed the NOD within five days of the project's approval, a thirty-day statute of limitations begins to run.¹¹⁵ If on the other hand, the NOD was not filed within five days of the project's approval, a 180-day statute of limitations follows.¹¹⁶

Third, the agency's decision may be challenged after the agency formally decides to approve a project.¹¹⁷ As in the situations above, if the agency properly filed an NOD, then the public has a thirty-day window within which to legally challenge either the agency's approval or the adequacy of the

¹¹¹ See *infra* notes 112-119 and accompanying text.

¹¹² See CAL. CODE REGS. tit. 14, § 15062(d) (1999).

¹¹³ See *id.*

¹¹⁴ See CAL. CODE REGS. tit. 14, § 15075(e) (1999).

¹¹⁵ See *id.*

¹¹⁶ See CAL. CODE REGS. tit. 14, § 15112 (c)(5)(A)-(B) (1999).

¹¹⁷ See CAL. CODE REGS. tit. 14, § 15112(c)(1) (1999).

EIR.¹¹⁸ However, if the lead agency does not file an NOD, the 180-day statute of limitations applies.¹¹⁹

2. *Standard of Review*

The scope of judicial review for attacking an agency's decision is set forth in the California Public Resource Code, Sections 21168 and 21168.5.¹²⁰ If the judicial challenge arises as a result of a proceeding in which the law requires a hearing and the challenge is based on non-compliance with CEQA, this action must proceed in accordance with Section 1094.5 of the California Code of Civil Procedure.¹²¹ In these situations the court may rule only on whether substantial evidence supported the decision.¹²² In all other actions, where the law does not require a hearing, the court's inquiry is limited to whether a prejudicial abuse of discretion occurred.¹²³ Prejudicial abuse of discretion can be established either by a failure to support a decision with substantial evidence or by not following procedural requirements.¹²⁴ Under both sections, the reviewing court determines whether the public agency followed proce-

¹¹⁸ *See id.*

¹¹⁹ *See* CAL. CODE REGS. tit. 14, § 15112 (c)(5)(A)-(B) (1999).

¹²⁰ *See* CAL. PUB. RES. CODE § 21168 (West 1996). *See also* CAL. PUB. RES. CODE § 21168.5 (West 1996).

¹²¹ *See* CAL. PUB. RES. CODE § 21168 (West 1996). Section 1094.5 of the California Code of Civil Procedure dictates the level of judicial review for any action to review, set aside, void or annul a decision of a public agency, made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency. *See id.* *See also* CAL. CODE CIV. PROC. § 1094.5 (West 1980).

¹²² *See* CAL. PUB. RES. CODE § 21168 (West 1996). "The court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in the light of the whole record." *See id.*

¹²³ *See* CAL. PUB. RES. CODE § 21168.5 (West 1996). This Section will govern the level of judicial review for any action based on a proceeding that does not require a hearing by law. *See id.*

¹²⁴ *See id.*

478 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:3

dural requirements or supported its decision with substantial evidence.¹²⁵

The next section of this Comment will discuss cumulative impacts. Addressed first is the issue of how cumulative effects are distinguished between the initial study and the EIR phase of environmental review; and second is when a cumulative impact should be considered significant.

III. DISCUSSION

The CEQA Guidelines have been especially unclear in the area of the cumulative environmental effects.¹²⁶ Before the Fifth Appellate District of the Court of Appeals of California provided clarification in *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus and Kings County Farm Bureau v. City of Hanford*, the two main areas of confusion were whether the test used to analyze “cumulatively considerable” impacts in the initial study is the same as the test used to analyze “cumulative impacts” in an EIR and what threshold should be used determine whether a cumulative impact is significant.¹²⁷

A. CASE LAW DEFINING CUMULATIVE IMPACT TESTS

1. *San Joaquin Raptor/Wildlife Center v. Stanislaus*

In *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*, the court of Appeals defined the test to be applied in examining the cumulative impacts of a proposed project.¹²⁸

¹²⁵ See CAL. PUB. RES. CODE § 21168 (West 1996). See also CAL. PUB. RES. CODE § 21168.5 (West 1996).

¹²⁶ See Maureen F. Gorsen, 1998 CEQA Guidelines Revisions: What Every CEQA Practitioner Needs to Know, (October 26, 1998) <http://www.ceres.ca.gov/ceqa_article_1098.html>.

¹²⁷ See *id.* See also *Kings County Farm Bureau v. Hanford*, 270 Cal. Rptr. 650(1990). See also *San Joaquin Raptor/Wildlife Rescue Center v. Stanislaus*, 49 Cal. Rptr. 2d 494 (1996).

¹²⁸ 49 Cal. Rptr. 2d 494, 504 (1996).

In *San Joaquin Raptor*, Western Stone Products (Western) applied to the County of Stanislaus (the County) for a permit to extract sand and gravel from a twenty-acre parcel of land located near the Tuolumne River.¹²⁹ The County approved the project based on its completion of an MND and its filing of an NOD.¹³⁰ Within the thirty-day statute of limitations, the San Joaquin Raptor/Wildlife Rescue Center (the Center) filed suit against the County, contending that the MND was legally insufficient because the County did not analyze the cumulative on-site and off-site impacts of the project.¹³¹ The Center argued that the County was required to analyze those cumulative impacts in its initial study because the finding of impacts to be “cumulatively considerable” in an initial study¹³² is the same as the finding of “significant cumulative impacts”¹³³ in the “cumulative impacts” analysis of an EIR.¹³⁴ The County, however,

¹²⁹ See *id.* at 496

¹³⁰ See *id.* at 497.

¹³¹ See *id.* at 497 (1996).

¹³² See CAL. CODE REGS. tit. 14, § 15064 (1999). This section requires a Lead Agency to find that a project may have a significant effect on the environment and thereby require an EIR to be prepared for the project where the project has possible environmental effects, which are individually limited but “cumulatively considerable.” The section goes on to state that, “cumulatively considerable” means that the incremental effect of an individual project are considerable when viewed in connection with the effects of past projects, the effect of other current projects, and the effects of probable future projects.” See *id.* See also *San Joaquin Raptor/Wildlife Rescue Center v. Stanislaus*, 49 Cal. Rptr. 2d 494, 503 (1996).

¹³³ See *id.* See also CAL. CODE REGS. tit. 14, § 15350 (1999). The definition of cumulative impacts contained in section 15355 applies throughout the guidelines unless the term is otherwise defined for a particular section. See *id.* See also CAL. CODE REGS. tit. 14, § 15355 (1999). Cumulative impacts is to two or more individual effects, which, when considered together, are considerable or which compound or increase other environmental impacts. The cumulative impact from several projects is the change in the environment, which results from the incremental impact of a project when added to other closely related past, present and reasonably foreseeable projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time. See *id.*

¹³⁴ See CAL. CODE REGS. tit. 14, § 15130(a) (1999). This section requires an EIR to discuss cumulative impacts of a project when viewed with other projects causing related impacts. This section references the general definition provided in Section 15355. See *id.* See also *San Joaquin Raptor/Wildlife Rescue Center v. Stanislaus*, 49 Cal. Rptr. 2d 494, 622 (1996).

480 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:3]

argued that the tests are different and that it complied with the appropriate test.¹³⁵

First, the court examined the initial study process and found that the “cumulatively considerable” test applies to this step.¹³⁶ The “cumulatively considerable” test requires the agency to determine whether the incremental impacts of the individual project are “cumulatively considerable” when viewed against the backdrop of other projects.¹³⁷ Thus, the focus is on whether the effects of the *individual* project are considerable.¹³⁸ If the agency lacks substantial evidence that any of the project’s incremental impacts are significant, then the project does not have “cumulatively considerable” impacts.¹³⁹

Next, the court examined the test to be applied when the agency develops an EIR. The court found that a “cumulative impacts” test applied.¹⁴⁰ Under this test, the incremental impacts of an individual project are *added* to impacts from other past, present and reasonably foreseeable future projects.¹⁴¹ If the combination of these impacts is cumulatively considerable, then the EIR is required to find that the proposed project has a significant effect on the environment.¹⁴² Comparing these two tests, the court concluded that the test used during an initial study is different than the test used in an EIR.¹⁴³ During the initial study a “cumulatively considerable” test applies, and the focus is on the individual project. When an agency devel-

¹³⁵ See *id.* at 505.

¹³⁶ See *id.* at 504.

¹³⁷ See *id.* at 504.

¹³⁸ See *id.*

¹³⁹ See *Leonoff v. Monterey County Bd. of Supervisors*, 222 Cal. 3d 1337, 1358 (1990), quoted in *San Joaquin Raptor/Wildlife Rescue Center v. Stanislaus*, 49 Cal. Rptr. 2d at 504.

¹⁴⁰ See *San Joaquin Raptor* 49 Cal. Rptr. 2d at 504.

¹⁴¹ See *id.* at 504.

¹⁴² See *id.*

¹⁴³ See *id.* at 504.

ops an EIR a “cumulative impacts” test applies and the focal point changes to the combination of the individual project and other past, present and reasonably foreseeable future projects.

The court then applied the “cumulatively considerable” test to the evidence in the County’s initial study.¹⁴⁴ Because the county presented a substantial amount of evidence suggesting that it had fully studied the problem and had determined that the project would not have a significant impact and because the Center did not present evidence to the contrary, the court held that the incremental impacts of Western’s proposed project were not cumulatively considerable.¹⁴⁵ The court thus found that the MND certified by the County was legally sufficient.¹⁴⁶

Subsequent interpretations of *San Joaquin Raptor* have provided lead agencies with the “de minimus theory” to assist them in determining whether a project’s cumulative impacts are sufficiently significant so as to trigger the preparation of an EIR.¹⁴⁷ The de minimus theory posits that a single project’s impacts would be so small that the environmental conditions would essentially be the same regardless of whether the proposed project is implemented.¹⁴⁸ Accordingly, the incremental impact of the project, by itself, would not be significant; thus, no EIR would be necessary.¹⁴⁹ This theory thus allows agencies to approve small projects, whose significant impacts are minor contributions to unavoidable cumulative impacts resulting

¹⁴⁴ See *id.* at 504-05

¹⁴⁵ See *San Joaquin Raptor*, 49 Cal. Rptr. 2d at 505.

¹⁴⁶ See *id.* at 504-505.

¹⁴⁷ See MICHAEL H. REMY ET AL., GUIDE TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 151-152 (9th ed. 1996). This CEQA manual provides practitioners with an analysis and interpretation of what CEQA statutes, guidelines, and court holdings mean. See *id.*

¹⁴⁸ See CAL. CODE REGS. tit. 14, § 15130 (a)(4) (1999).

¹⁴⁹ See MICHAEL H. REMY ET AL., GUIDE TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 151-152 (9th ed. 1996).

482 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:3]

from other projects, and focus their resources on larger problems.¹⁵⁰

2. *Kings County Farm Bureau v. City of Hanford*

While the previous case resolved the test confusion, the second case, *King's County Farm Bureau v. City of Hanford*,¹⁵¹ alleviated the confusion over which threshold to use to determine whether an individual project's impacts added to the impacts of other projects is significant during the EIR process.¹⁵² In *King's County Farm Bureau*, Armstrong Tire and Rubber applied to the City of Hanford (Hanford) for a permit to build a co-generation plant.¹⁵³ In response, Hanford's city council (City Council) began the review process and, after completing an EIR, determined that the project would have no significant effect on the environment.¹⁵⁴ Accordingly, the project was approved.¹⁵⁵ The Farm Bureau, a group of citizens concerned about a healthy environment, brought suit challenging the sufficiency of the cumulative impacts analysis in the EIR and the determination that the proposed project would have no significant effect.¹⁵⁶ In defense, Hanford argued that it properly focused on the incremental effects of the proposed project during the cumulative impacts analysis, rather than on the combined effects.¹⁵⁷ Hanford also argued that its failure to consider as significant the cumulative impacts from the individual project added to impacts from past, present and reasonably foreseeable future projects was proper because once the impacts of an individual project are found to be insignificant, the incre-

¹⁵⁰ See *id.*

¹⁵¹ 270 Cal. Rptr. 650 (1990).

¹⁵² See *id.* at 662.

¹⁵³ See *id.* at 653.

¹⁵⁴ See *id.* at 655.

¹⁵⁵ See *id.* at 655-56.

¹⁵⁶ See *Kings County Farm Bureau*, 270 Cal. Rptr. 650 at 653.

¹⁵⁷ See *id.* at 661.

mental effects of the individual project cannot be considerable.¹⁵⁸

In analyzing these arguments, the *Hanford* court initially noted that, traditionally, analyzing cumulative impacts in an EIR tended to focus on the significance of additional impacts from many projects rather than on the incremental effect of any individual project.¹⁵⁹ The court found this method problematic because environmental damage often occurs incrementally from a variety of small sources, the effects of which will appear insignificant unless viewed in light of other projects.¹⁶⁰ The court then attempted to remedy this problem by clarifying a new standard for the cumulative impacts analysis in an EIR: analyze *all* significant impacts.¹⁶¹ The court reasoned that this standard results in a more meaningful analysis and enables the lead agency to have sufficient information on which to base its decision.¹⁶² Ideally, this standard would prevent the approval of projects that in the context of all projects would have a collectively significant effect on the environment.¹⁶³

Applying this rule to the City Council's EIR, the *Hanford* court found that the EIR improperly focused on the individual project's effects and failed to analyze the collective effect of the proposed project on the current state of the environment.¹⁶⁴ Consequently, the court held the EIR was legally insufficient.¹⁶⁵

The effect of the *King's County Farm Bureau* decision was to create what has become known as the "one molecule rule,"

¹⁵⁸ See *id.* at 662.

¹⁵⁹ See *id.* at 662.

¹⁶⁰ See *id.*

¹⁶¹ See *Kings County Farm Bureau*, 270 Cal. Rptr. 650 at 662. See also CAL. CODE REGS. tit. 14, § 15130(a) (1999).

¹⁶² See *Kings County Farm Bureau*, 270 Cal. Rptr. 650 at 662.

¹⁶³ See *id.* at 662.

¹⁶⁴ See *id.* at 662.

¹⁶⁵ See *id.* at 662.

484 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:3]

which holds that even minor emissions can create a significant cumulative impact; one more molecule of pollution can be the straw that breaks the camel's back.¹⁶⁶ This rule thus addresses the problematic notion that minor amounts of additional pollution, in areas with poor environmental quality, would not significantly change the environment.¹⁶⁷ However, finding that one more molecule can be significant does not automatically stop the project from proceeding.¹⁶⁸ Rather it means that the agency must complete the findings phase prior to certifying the EIR and approving the project.¹⁶⁹

3. *Combined Reading of San Joaquin Raptor and King's County Farm Bureau*

Read together, *San Joaquin Raptor* and *King's County Farm Bureau*¹⁷⁰ reveals several distinctions between the cumulative impacts analysis used during an initial study and the one used during an EIR.¹⁷¹ For example, a "cumulatively considerable" test, which focuses on the significance of an *individual* project's incremental effect, is used during an initial study.¹⁷² In contrast, the test used in an EIR is the "collectively significant" test, which focuses on the *collective* impact of the project.¹⁷³ Furthermore, the one molecule rule does not apply during an initial study because the finding of significance and the need to prepare an EIR must turn on the incremental impact of a project and not the impact of other projects.¹⁷⁴ Con-

¹⁶⁶ See MICHAEL H. REMY ET AL., GUIDE TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 308-309 (9th ed. 1996).

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ See generally *San Joaquin Raptor*, 49 Cal. Rptr. 2d 494. See generally also *Kings County Farm Bureau*, 270 Cal. Rptr. 650. The Fifth Appellate District of the Court of Appeal of California wrote both of these cases. See *id.*

¹⁷¹ See *San Joaquin Raptor*, 49 Cal. Rptr. 2d at 504.

¹⁷² See *id.* at 504.

¹⁷³ See generally *id.*

¹⁷⁴ See MICHAEL H. REMY ET AL., GUIDE TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 151-152 (9th ed. 1996).

sequently, the finding of significance during an EIR is more strict and requires a finding of significance for even a minor incremental impact.¹⁷⁵ These two landmark cases thus clarify the analysis techniques used in examining cumulative impacts.¹⁷⁶

B. REVISIONS TO CEQA GUIDELINES DEALING WITH CUMULATIVE IMPACTS

In October 1998, the OPR revised Sections 15064 and 15130 of Title 14 of the CEQA Guidelines to reflect these clarifications made by *San Joaquin Raptor* and *Hanford* courts.¹⁷⁷

1. Analyzing Cumulative Effects in the Initial Study

One of the revisions included the addition of subsection (i)¹⁷⁸ to Section 15064 of the California Code of Regulations.¹⁷⁹ This new subsection provides agencies with guidance in determining whether a project's cumulative impacts are potentially significant, thus triggering the preparation of an EIR.¹⁸⁰ Specifically, subsection (i) clarifies that a "cumulatively considerable" test must be used to analyze cumulative impacts during the

¹⁷⁵ See *Kings County Farm*, 270 Cal. Rptr. 650 at 662.

¹⁷⁶ See *id.* generally. See generally also *San Joaquin Raptor*, 49 Cal. Rptr. 2d 494.

¹⁷⁷ See Maureen F. Gorsen, 1998 *CEQA Guidelines Revisions: What Every CEQA Practitioner Needs to Know* (last modified Nov. 12, 1998) <http://www.ceres.ca.gov/ceqa_article_1098.html>. See also *Final Text-CEQA Guidelines Revisions* (visited March 2, 2000)

<http://www.ceres.ca.gov/theme/env_law/ceqa/rev/final_102698.html>. The final text of these revisions cite *San Joaquin Raptor/Wildlife Rescue Center v. Stanislaus and Kings County Farm Bureau v. Hanford* following the revised text. See *id.*

¹⁷⁸ See CAL. CODE REGS. tit. 14, § 15064(i)(1) (1999).

¹⁷⁹ See *Final Text-CEQA Guidelines Revisions* (visited March 2, 2000) <http://www.ceres.ca.gov/theme/env_law/ceqa/rev/final_102698.html>. See also CAL. CODE REGS. tit. 14, § 15064 (1996). This section offered guidance to agencies in how to determine if an effect was significant. This section did not address the issue of cumulative impacts prior to 1998. See *id.*

¹⁸⁰ See CAL. CODE REGS. tit. 14, § 15064(i) (1999). Subsection (i) was added to the revised section 15064. Subsection (i) includes five subsections to help guide agencies in determining if cumulative impacts are significant and require the preparation of an EIR. See *id.*

486 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:3]

initial study and stresses that the decision to prepare an EIR must depend on the "incremental effect of the individual project."¹⁸¹ The subsection also specifies that a 'cumulatively considerable' effect is the 'incremental effect of an individual project,' which becomes considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.¹⁸²

Another revision is the incorporation of the *de minimus* theory.¹⁸³ This portion of the revised CEQA Guidelines stresses that the determination of a project's significant environmental impact hinges on the individual incremental effect of the specific project.¹⁸⁴ Accordingly, the revisions allow an agency to determine that the incremental impacts of the proposed project are so miniscule that they do not change the environmental conditions of the area and are therefore insignificant.¹⁸⁵

2. *Analyzing Cumulative Effects In An EIR*

The revised CEQA Guidelines now describe the cumulative impacts that an EIR should examine as those impacts that are cumulatively considerable.¹⁸⁶ Thus, a lead agency need not consider an incremental effect that is not individually significant. Rather, the lead agency must merely state its reasons for determining that the incremental effect is not cumulatively considerable.¹⁸⁷

This was not the only change, however. Many additions to section 15130 parallel those included in the new subsection

¹⁸¹ See CAL. CODE REGS. tit. 14, § 15064(i)(1) (1999).

¹⁸² See *id.*

¹⁸³ See CAL. CODE REGS. tit. 14, § 15064(i)(4) (1999).

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*

¹⁸⁶ See CAL. CODE REGS. tit. 14, § 15065(c) (1999). See also CAL. CODE REGS. tit. 14, § 15130(a) (1999).

¹⁸⁷ See *id.*

15064(i).¹⁸⁸ One such addition was the provision for de minimus impacts in the EIR phase of environmental review.¹⁸⁹ As in the initial study analysis, this means that a lead agency may determine that a project's contribution to a significant cumulative impact is de minimus and, therefore, not significant.¹⁹⁰

C. GUIDELINES: REGULATORY MANDATES OR FLEXIBLE AIDS

Amidst the original development and the subsequent changes, the California Legislature declared the CEQA Guidelines binding upon public agency decisions.¹⁹¹ The Legislature, however, has never addressed the issue of whether the guidelines are binding upon the courts. Instead, the courts themselves have addressed whether the guidelines are binding upon their decisions.¹⁹²

1. *City of Santa Ana v. City of Garden Grove: The Regulatory Mandate Theory*

The extent of the guidelines' authority was addressed in *City of Santa Ana v. City of Garden Grove*.¹⁹³ In *Garden Grove*, the City Council of Garden Grove (City Council) amended its general plan to rezone a parcel of land from residential use to industrial use.¹⁹⁴ The City Council approved the rezoning measure based on its completion of an ND.¹⁹⁵ The City of Santa Ana (Santa Ana), the town bordering the rezoned parcel, filed suit contending that the ND was legally insufficient because substantial evidence in the record required the preparation of an

¹⁸⁸ See CAL. CODE REGS. tit. 14, § 15130 (1999).

¹⁸⁹ See CAL. CODE REGS. tit. 14, § 15130(a)(4) (1999).

¹⁹⁰ See *id.*

¹⁹¹ See CAL. PUB. RES. CODE § 21083 (West 1996). See also CAL. PUB. RES. CODE § 21083.1 (West 1996).

¹⁹² See *id.*

¹⁹³ See *City of Santa Ana v. City of Garden Grove*, 160 Cal. Rptr. 907, 911 (1979).

¹⁹⁴ See *id.* at 908.

¹⁹⁵ See *id.*

488 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:3]

EIR.¹⁹⁶ The City Council, however, contended that amendments to a general plan were not subject to CEQA review.¹⁹⁷

At trial, the court held that the OPR exceeded its delegated rule-making power, by stating in the CEQA Guidelines that general plans were subject to CEQA review.¹⁹⁸ The trial court based its ruling on Section 21080 of the California Public Resources Code, which provided a list of projects that were subject to CEQA.¹⁹⁹ An amendment to a general plan was not included on this list of projects.²⁰⁰ This lack of inclusion led the trial court to hold that amended general plans were intended to be excluded from review.²⁰¹

On appeal, the court reversed the trial court's ruling and concluded that the OPR did not exceed its scope of delegated powers.²⁰² In reaching this conclusion, the court first examined the legislative intent concerning which projects should be examined under the guidelines.²⁰³ Specifically, the court looked at the express language of California Public Resource Code Section 21083.²⁰⁴ This section modified the list in Section 21080 by stating that "except as otherwise provided in this division, this division shall apply to discretionary projects proposed to be carried out or approved by public agencies, including but not limited to" ²⁰⁵ The *Garden Grove* court interpreted this to mean the list was not exhaustive.²⁰⁶ This interpretation, in the court's view, was supported by the fact that

¹⁹⁶ See *id.*

¹⁹⁷ See *id.*

¹⁹⁸ See *City of Santa Ana*, 160 Cal. Rptr. at 908-909.

¹⁹⁹ See *id.* at 909-910.

²⁰⁰ See *id.* at 909.

²⁰¹ See *id.*

²⁰² See *id.*

²⁰³ See *City of Santa Ana*, 160 Cal. Rptr. 907 at 910.

²⁰⁴ See *id.* at 910.

²⁰⁵ See *id.* at 910-911.

²⁰⁶ See *id.* at 911.

nowhere else in the statute did the legislature specifically exempt general plan amendments.²⁰⁷ Thus, merely because the list did not specifically mention amended general plans did not mean they were excluded; rather they properly came within the scope of CEQA.²⁰⁸

The court next determined the extent to which the Legislature had delegated rule-making authority to the OPR.²⁰⁹ The non-delegation doctrine states that the legislature may not abdicate its responsibility of deciding truly fundamental issues by delegating authority to an administrative agency.²¹⁰ For example, a legislature has not improperly delegated its power when it has made the fundamental policy decisions and merely delegated to another agency the task of implementing those policies.²¹¹ A legislature, however, must include adequate safeguards to ensure that the agency does not exceed their delegated powers.²¹² In this case, the *Garden Grove* court determined that the legislature did not improperly delegate its power because it had made the fundamental policy decisions and had merely delegated to the OPR the task of implementing them.²¹³ Additionally, the Legislature's phrasing of Section 21083 provided adequate safeguards because the OPR was not given unrestricted power.²¹⁴ Consequently, because the OPR did not exceed the authority that the Legislature intended in Section 21083, its action had been properly delegated and carried out.²¹⁵

²⁰⁷ See *id.* at 910.

²⁰⁸ See *City of Santa Ana*, 160 Cal. Rptr. 907 at 911-912.

²⁰⁹ See *id.* at 911.

²¹⁰ See *id.*

²¹¹ See *id.*

²¹² See *id.*

²¹³ See *City of Santa Ana*, 160 Cal. Rptr. at 911.

²¹⁴ See *id.*

²¹⁵ See *id.*

490 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:3]

Finally, the court decided the issue of when courts are bound by the CEQA Guidelines.²¹⁶ In general, the courts retain the ultimate power to interpret CEQA and declare the statute's meaning.²¹⁷ The courts also have the authority to reject an administration's interpretation of CEQA.²¹⁸ However, the court stated that these guidelines deserve great weight and must be followed by the courts unless they are clearly erroneous or unauthorized.²¹⁹

2. *Fairbank v. City of Mill Valley-Flexible Aids Theory*

The court in *Fairbank v. City of Mill Valley*²²⁰ stated a different theory regarding the binding effect of the guidelines.²²¹ The *Fairbank* court stated that although the California Supreme Court has admonished the lower courts to afford great weight to the CEQA Guidelines, it has not declared them binding upon the courts.²²² In fact, these regulations were adopted to implement the CEQA statute are appropriately called "guidelines."²²³ The term "guidelines" was carefully selected by the California Legislature to allow flexibility of action.²²⁴ Thus, the *Fairbank* court defined the guidelines as non-binding and distinguished them from other regulations that require a strict application based on legislative intent.²²⁵

²¹⁶ See *id.*

²¹⁷ See *id.*

²¹⁸ See *City of Santa Ana*, 160 Cal. Rptr. at 911.

²¹⁹ See *id.*

²²⁰ 89 Cal. Rptr. 2d 233 (1999).

²²¹ See *Fairbank v. City of Mill Valley*, 89 Cal. Rptr. 2d 233, 242 (1999). The court in dictum to a decision holding as untimely a petition for rehearing on the retroactivity of the revised 1998 guidelines, delivered a different theory regarding the binding effect of the guidelines. See *id.*

²²² See *id.* at 242.

²²³ See *id.*

²²⁴ See *id.*

²²⁵ See *id.*

IV. CRITIQUE

When the OPR adopted the Guideline revisions in 1998, the OPR stated that it was not changing the law but merely codifying judicial decisions.²²⁶ In actuality, the OPR's revisions have substantially changed the law with regard to how cumulative impacts must be analyzed during the EIR process. As a result, the revisions have been dramatically weakened by providing lead agencies with insufficient information to assess a project's impacts.

A. INCORPORATION OF THE PHRASE "CUMULATIVELY CONSIDERABLE"

Prior to the 1998 revisions, the CEQA Guidelines required a lead agency to analyze *all* 'significant cumulative impacts' in the EIR.²²⁷ After the revisions, however, the CEQA Guidelines require a lead agency to analyze only those cumulative effects that are defined as "cumulatively considerable" in the initial study.²²⁸ Thus, if a proposed project has cumulative effects, but which are not found to be "cumulatively considerable," then the lead agency need not analyze those effects in the EIR.

An example will help illustrate this point. Imagine a proposed project to build a plant, which would emit sulfur dioxide, nitrogen dioxide, and carbon monoxide, is currently undergoing an initial study. Further assume that the project was located in an area that was out of compliance with air quality regulation. Next assume that the lead agency found that the incremental effect of each of the project's emissions was not "cumulatively considerable" because the individual emissions of the proposed project were within the regulatory prescribed range for that type of plant. These emissions, however, would

²²⁶ See Maureen F. Gorsen, *1998 CEQA Guidelines Revisions: What Every CEQA Practitioner Needs to Know* (last modified Nov. 12, 1998) <http://www.ceres.ca.gov/ceqa_article_1098.html>.

²²⁷ See CAL. CODE REGS. tit. 14, § 15130 (1996).

²²⁸ See CAL. CODE REGS. tit. 14, § 15130(a) (1999). See also *supra* notes 128-150 and accompanying text.

492 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:3]

exacerbate the current air quality violations. Nevertheless, because the EIR need not analyze impacts that are not cumulatively considerable impacts, according to the revised CEQA Guidelines, the emissions will not be addressed or mitigated. This will be the result even if the project is otherwise required to undergo an EIR because under the revised guidelines the lead agency only has to analyze those cumulative effects that were defined as "cumulatively considerable" in the initial study. In contrast, under the CEQA Guidelines prior to the revisions, the lead agency was required to analyze all "significant cumulative impacts."²²⁹ This previous test was broader and allowed the lead agency to render a full picture of all the cumulative impacts that a proposed project would have.

In the attempt to codify the holding in *San Joaquin* and mark the distinction between the analysis used in an EIR and that used in an initial study, the revised CEQA Guidelines have provided a loophole in the EIR process. The court in *San Joaquin* stressed that the test used to analyze cumulative impacts in an initial study should be the 'cumulatively considerable' test.²³⁰ This phrase was therefore incorporated, over one dozen times,²³¹ into the CEQA Guideline sections that deal with cumulative impacts and was probably the OPR's attempt to codify the line of demarcation that the *San Joaquin* court had established.²³² In this attempted codification of *San Joaquin*, the OPR included cumulative considerable in too many places and therefore created a way to get out of a cumulative impact analysis in an EIR. This casual incorporation of the

²²⁹ See CAL. CODE REGS. tit. 14, § 15130(a) (1999). This section requires an EIR to discuss cumulative impacts of a project when viewed with other projects causing related impacts. This section references the general definition provided in Section 15355. See *id.* See also *San Joaquin Raptor*, 49 Cal. Rptr. 2d at 503.

²³⁰ See *id.* at 503.

²³¹ See CAL. CODE REGS. tit. 14, § 15064 (1999). The phrase 'cumulatively considerable' is used in the revised section seven times. Prior to the revisions, the phrase was used zero times. See *id.* See also CAL. CODE REGS. tit. 14, § 15130 (1999). The phrase 'cumulatively considerable' was used in the revised section 15130 six times. Prior to the revisions, the phrase was not used at all in that section. See *id.*

²³² See Maureen F. Gorsen, 1998 *CEQA Guidelines Revisions: What Every CEQA Practitioner Needs to Know* (last modified Nov. 12, 1998) <http://www.ceres.ca.gov/ceqa_article_1098.html>.

phrase without further clarification actually narrows the scope of the cumulative effects examined in the EIR because the lead agency only has to analyze those cumulative effects that were defined as “cumulatively considerable” in the initial study. Consequently, lead agencies may not have sufficient information to meaningfully assess whether to approve or disapprove a project.

B. INCORPORATION OF THE DE MINIMUS THEORY

The second substantial change to the guidelines was the inclusion of the de minimus effects test in the EIR phase of environmental review.²³³ This revision has effectively overruled the *Hanford* court’s “one molecule rule.” The de minimus theory is at odds with the concept of cumulative effects. Cumulative effects should assess cumulative damage as a whole greater than the sum of its parts. Stated another way, the true cumulative impacts of a project can only be known after assessing the project against the backdrop of the current state of the environment. The de minimus theory takes away this backdrop and essentially looks at a project’s effects in a vacuum.

The purpose of CEQA is to aid the public agencies in identifying critical thresholds that may affect the health and safety of the people of California.²³⁴ The revisions thwart that purpose by limiting the amount of information available to lead agencies. Furthermore, the revisions have removed the basic function of the EIR process and have thus eliminated both the ability to make a comprehensive assessment of a project’s ef-

²³³ See CAL. CODE REGS. tit. 14, § 15130(a)(4) (1999). “An EIR may determine that a project’s contribution to a significant cumulative impact is de minimus and thus is not significant. A de minimus contribution means that environmental conditions would essentially be the same whether or not the proposed project is implemented.” *Id.*

²³⁴ See CAL. PUB. RES. CODE § 21000 (West 1996).

494 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:3

fects and the ability to use this assessment to make informed decisions regarding California's development.²³⁵

V. PROPOSAL

With regard to subsection (a) of Section 15130,²³⁶ any subsequent revisions to the CEQA Guidelines should require that an EIR include an examination of the effect of *all significant impacts* and not just those that were deemed 'cumulatively considerable' during the initial study. Not only would this close the loophole, but it would widen the scope of analysis for CEQA cumulative impacts review and thus provide a full picture of the impacts of a project.

With respect to the inclusion of the de minimus effects tests during the EIR phase of environmental review,²³⁷ the CEQA Guidelines should remove this provision altogether. Eliminating this test would realign the EIR process with one of the main reasons that the California Legislature adopted CEQA in the first place: to identify the adverse environmental effects of proposed projects.²³⁸

Until the CEQA Guidelines are amended, however, the court should continue to read Section 15130 to include an examination of *all significant effects* as determined in *Kings County*.²³⁹ Additionally, the court should follow the *Kings County* ruling that the de minimus theory is not applicable to projects in the EIR phase of environmental review. Although this would violate the guidelines, which are erroneous and therefore unauthorized, it would nevertheless be consistent with the very Legislative intent that the guidelines disobey. This should not pose a problem for future courts because

²³⁵ See MICHAEL H. REMY ET AL., GUIDE TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 151-152 (9th ed. 1996).

²³⁶ See CAL. CODE REGS. tit. 14, § 15130 (1999).

²³⁷ See CAL. CODE REGS. tit. 14, § 15130(a)(4) (1999).

²³⁸ See CAL. PUB. RES. CODE § 21000 (West 1996).

²³⁹ See *Kings County Farm Bureau*, 270 Cal. Rptr. 650 at 662.

courts are bound by stare decisis. Stare decisis is a common law rule that courts should not depart from judicial precedent without special justification.²⁴⁰ Stare decisis ensures stability and maintains the rule of law.²⁴¹ In addition to the binding effect of stare decisis, *Fairbank* determined, the courts are not bound by the CEQA Guidelines. Thus, the courts must continue to examine cumulative impacts based on the holdings in *San Joaquin* and *Kings County*.

VI. CONCLUSION

The 1998 revisions of the CEQA Guidelines narrow the scope of cumulative effects examined in the EIR. These revisions debase the California's Legislature's intention of providing lead agencies with sufficient information to meaningfully assess whether to approve a project. Consequently, these revisions exceed the scope of power delegated to the OPR. The courts, however, must not allow the OPR to usurp the legislative and judicial authority; accordingly, they must base future cumulative impact decisions on their own judicial precedent and not the erroneous guidelines.

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²⁴⁰ See *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

²⁴¹ See *id.*

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